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FORFEITURE OF AIRCRAFT USED IN CRIMES— THE CONSEQUENCES TO THE INNOCENT OWNER OR SECURITY INTEREST HOLDER

STEPHEN A. YOUNGMAN

FORFEITURE OF AIRCRAFT used in crimes is probably, at most, a remote concern to the typical aircraft owner or to one who makes a loan which is secured by an aircraft. An aircraft, however, is subject to forfeiture for a wide variety of criminal activities.¹ Forfeiture statutes may even lead to forfeiture of an innocent owner's aircraft² or of an aircraft in which a person holds a security interest.³ While such a result may seem very inequitable to the innocent owner or security interest holder, the basis for allowing these forfeitures is deeply rooted in the history of forfeiture law.⁴

This comment will trace the development and history of forfeiture as applied to innocent owners and security interest holders.⁵ Recent federal court decisions will be examined, and the present state of the law will be discussed. Additionally, possible bases for avoiding forfeiture of the innocent

¹ Smith, *How to Prevent Federal Forfeitures in Criminal Cases*, 26 PRAC. LAW. 11, 12-13 (1980). See, e.g., 21 U.S.C. § 881 (1982); 49 U.S.C. §§ 781, 782 (1976) (transportation of controlled substances).

² For purposes of this comment, an innocent owner is one who had no knowledge of any illegal use of his property and who did not participate in the illegal activity. See *infra* text accompanying note 107.

³ A security interest is defined by the Uniform Commercial Code as "an interest in personal property or fixtures which secures payment or performance of an obligation." U.C.C. § 1-201(37) (1977). See *infra* text accompanying notes 113-160 for a discussion of forfeiture of the property of an innocent owner.

⁴ See *infra* text accompanying notes 6-107 for the history of forfeiture law.

⁵ See *infra* notes 6-107.

owner's or security interest holder's property will be suggested.

I. HISTORICAL BACKGROUND

The rationale for allowing forfeiture of an aircraft irrespective of the culpability⁶ of the owner or security interest holder has its roots in Biblical times.⁷ In the Old Testament's Book of Exodus it is said: "If an ox gore a man that he dies, the ox shall be stoned, and his flesh not eaten."⁸ The ox is considered the offending object without regard to the conduct of its owner. This idea of property being the offending object is also evidenced in Greek and Roman law, where forfeiture of the death-causing object was unrelated to the fault of the owner.⁹ This concept of forfeiture without fault was enunciated by Blackstone in his Commentaries on the Laws of England in which he stated: "It matters not whether the owner were concerned in the killing or not; for, if a man kills another with my sword, the sword is forfeited as an accursed thing."¹⁰

The concept of the "deodand"¹¹ developed in England as the basis for forfeiture of property of an innocent owner.¹²

⁶ Culpability means the blameworthiness or criminal intent of a person. BLACK'S LAW DICTIONARY 341 (5th ed. 1979).

⁷ The early history of forfeiture law has been well documented. See, e.g., O. HOLMES, *THE COMMON LAW* 7-12 (1946); Finklestein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 169-233 (1973); Smith, *Modern Forfeiture Law and Policy: A Proposal For Reform*, 29 WM. & MARY L. REV. 661, 661-69 (1978); Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 770-92 (1977); Note, *Aircraft Forfeiture — Illegal Activities*, 47 J. AIR L. & COM. 385, 387-94 (1982); Note, *Forfeiture of Property Used in Connection with Criminal Acts*, 24 WAYNE L. REV. 83, 83-86 (1978).

⁸ Exodus 21:28.

⁹ O. HOLMES, *supra* note 7, at 7-8. In the Greek law, if a man was killed by an inanimate object, it was to be "cast beyond the borders." *Id.* at 8. In Roman law if damage was done by an animal or inanimate object, it had to be surrendered or, in the alternative, the owner had to pay for the damage. *Id.*

¹⁰ 1 W. BLACKSTONE, COMMENTARIES 301 (T. Cooley ed. 1899).

¹¹ A deodand is "any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the crown to be applied to pious uses." BLACK'S LAW DICTIONARY 392 (5th ed. 1979).

¹² Smith, *supra* note 7, at 661; Note, *Aircraft Forfeitures—Illegal Activities*, *supra* note 7, at 388.

Forfeited property passed to the King, purportedly for use by the Church in saving the soul of the person killed by the object.¹³ More likely, however, the King used such property for charity or in order to support the deceased's family.¹⁴ The concept of deodands was eliminated in England,¹⁵ probably due to the increased number of accidental deaths during the industrial revolution.¹⁶ While deodands were formally abolished in 1846 by the Act for Compensating the Families of Persons Killed by Accidents,¹⁷ in a case¹⁸ decided the same year, the court nevertheless continued to follow the principle that property could be forfeited regardless of the owner's fault.¹⁹

The historical background for forfeiture discussed above was instrumental in the development of the law of forfeiture in the United States as applied to innocent owners and security interest holders. One important decision early in this development was *The Palmyra*.²⁰ That case involved a Spanish vessel which the United States seized on the high seas pursuant to a statute²¹ for piracy.²² In an action for condemnation²³ of the vessel, the lower court called for the return of the

¹³ W. BLACKSTONE, *supra* note 10, at 300.

¹⁴ Smith, *supra* note 7, at 661; Note, *Aircraft Forfeiture — Illegal Activities*, *supra* note 7, at 388.

¹⁵ Smith, *supra* note 7, at 661; Note, *Aircraft Forfeiture — Illegal Activities*, *supra* note 7, at 388; *see infra* note 17 and accompanying text.

¹⁶ Note, *Aircraft Forfeiture — Illegal Activities*, *supra* note 7, at 388.

¹⁷ *Id.* See 1846, 9 & 10 Vict. ch. 62.

¹⁸ *Regina v. Woodrow*, 15 M. & W. 404, 153 Eng. Rep. 907 (Exch. 1846). In that case a tobacco dealer received adulterated tobacco products from the manufacturer. The penalty for possession of such adulterated tobacco products was forfeiture of 200 pounds of such tobacco products. Although the defendant claimed to have no knowledge of the adulteration, the court held that knowledge of the condition was not a requirement of the statute and ordered the forfeiture. 153 Eng. Rep. at 910.

¹⁹ Note, *Aircraft Forfeiture — Illegal Activities*, *supra* note 7, at 388.

²⁰ 25 U.S. 1 (12 Wheat) (1827); *See* Note, *Aircraft Forfeiture — Illegal Activities*, *supra* note 7, at 389.

²¹ An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, 3 Stat. 510 (1819); An Act to Continue in Force "An Act to Protect the Commerce of the United States," and to Make Further Provisions for Punishing the Crime of Piracy, 3 Stat. 600 (1820).

²² 25 U.S. at 2.

²³ An action for condemnation under admiralty law is an action *in rem* to declare a captured vessel as a prize, or to forfeit the vessel to the government for violation of laws. BLACK'S LAW DICTIONARY 264 (5th ed. 1979).

ship to its owner.²⁴ The United States Supreme Court declared the action to be a proceeding in rem²⁵ under authority of an act of Congress.²⁶ The primary argument asserted against forfeiture was that before a proceeding against the vessel could have been instituted in rem, a conviction in personam²⁷ should have been entered for the offense of piracy.²⁸ The Court noted that at common law personal property was forfeited to the Crown for felonies, as forfeiture was the consequence of a person's conviction.²⁹ The Court, however, found this common law view inapplicable to statutorily created forfeitures in rem.³⁰ In justifying forfeiture of the vessel, the Court stated: "The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing"³¹ The Court viewed the proceeding in rem against the ship as independent of and unaffected by any personal criminal prosecution against the offenders.³²

The Palmyra established that a forfeiture proceeding is brought against the property, independent of any proceeding against the property owner, and the theoretical groundwork was thus laid for forfeiture of property regardless of the

²⁴ 25 U.S. at 2.

²⁵ A proceeding in rem is an action against the property itself or to enforce rights in that property. *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877).

²⁶ 25 U.S. at 5. See *supra* note 21 for the Congressional acts which authorized the action.

²⁷ An action in personam is an action against the person. BLACK'S LAW DICTIONARY 711 (5th ed. 1979).

²⁸ 25 U.S. at 8. At the time of the action against the ship, the statute did not provide for personal punishment for the offense of piracy. *Id.* at 9.

²⁹ *Id.* at 9.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* To explain the rationale of the proceeding against the ship as being independent of a personal criminal prosecution, the Court stated:

If the argument at the bar [the requirement of personal conviction] were well founded, there could never be a judgment of condemnation pronounced against any vessel coming within the prohibitions of the acts on which the present libel is founded; for there is no act of Congress which provides for the personal punishment of offenders who commit 'any piratical aggression, search, restraint, depredation or seizure,' within the meaning of those acts. Such a construction of the enactments, which goes wholly to defeat their operation, and violates their plain import, is utterly inadmissible.

Id.

owner's or security interest holder's wrongdoing. *The Palmyra*, however, did not completely develop forfeiture law as applied to the innocent owner or security interest holder. The Court in *The Palmyra* referred to the conviction of an offender rather than an owner or security interest holder.³³ Consequently, the lack of a statute punishing piracy³⁴ provided a basis for upholding the forfeiture in *The Palmyra*, while today personal punishment is provided for activities which subject an aircraft to forfeiture.³⁵

The idea that an owner's property can be subject to forfeiture without his having committed any wrongdoing was further developed by the United States Supreme Court in *Dobbins Distillery v. United States*.³⁶ In *Dobbins Distillery* the owner leased a distillery to a third party.³⁷ While operating and in possession of the distillery, the lessee allegedly failed to keep required records, falsified the records kept, and refused to deliver, in violation of the statute, these records to revenue officers.³⁸ As a result of the lessee's actions, the distillery was forfeited.³⁹ The distillery owner defended the forfeiture action by claiming that he had no knowledge of the lessee's several alleged violations.⁴⁰ Nonetheless, the United States Circuit Court for the District of Iowa ordered the property forfeited and the Supreme Court affirmed that order.⁴¹

As in *The Palmyra*, the Court based its decision on the rationale that the action proceeded against the property itself, rather than against the owner.⁴² The Court held that the property was subject to forfeiture because of its contribution

³³ *Id.*

³⁴ See *supra* note 28.

³⁵ See *supra* note 1 for some statutes that may provide for an aircraft forfeiture.

³⁶ 96 U.S. 395 (1878).

³⁷ *Id.* at 396.

³⁸ *Id.* See An Act Imposing Taxes on Distilled Spirits and Tobacco, and for Other Purposes, 25 Stat. 125, 142-43 (1868).

³⁹ 96 U.S. at 395.

⁴⁰ *Id.* at 397.

⁴¹ *Id.* at 404.

⁴² *Id.* at 399. See *supra* text accompanying note 31 for the rationale of the Court in *The Palmyra* holding that the offense attaches to the thing.

to the illegal acts of the lessee.⁴³ The Court found the owner's lack of knowledge irrelevant since the owner, in leasing the land as a distillery, was subject to any illegal use that might be made of the property.⁴⁴ The basis of the forfeiture, therefore, was that the offense attached to the distillery itself and not to the owner's action.⁴⁵

Forfeiture, as applied to the holder of a security interest, was considered by the Supreme Court in *Goldsmith-Grant Co. v. United States*.⁴⁶ *Goldsmith-Grant* involved the forfeiture of a Hudson automobile used in violation of tax laws.⁴⁷ *Goldsmith-Grant Co.* ("the Company") sold the automobile, but retained title until the full amount was paid.⁴⁸ The purchaser used the automobile to transport untaxed liquor, and the car was subsequently forfeited.⁴⁹ The Company stated that it had neither knowledge of, nor reason to suspect any illegal use of the automobile.⁵⁰ Nevertheless, the property was ordered forfeited.⁵¹

The Company argued that the forfeiture was "taking of property without just compensation in violation of due process"⁵² since it, as owner, was without knowledge of and had

⁴³ 96 U.S. at 399. Referring to the role of the property in the illegal acts, the Court stated:

[T]he forfeiture . . . is aimed against the distillery, and the real and personal property used in connection with same, including the real estate used to facilitate the operation of distilling, and which is conducive to that end as the means of ingress or egress, and all personal property of the kind found there.

Id.

⁴⁴ *Id.*

⁴⁵ *Id.* at 401.

⁴⁶ 254 U.S. 505 (1921).

⁴⁷ See An Act of Congress passed July 13, 1866, 14 Stat. 98, 151 which provides:

Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed . . . are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities . . . shall be forfeited, . . . and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited.

⁴⁸ *Id.* at 509.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² The Fifth Amendment to the United States Constitution provides in part that no

not participated in any illegal activities.⁵³ The Company also argued that property is regularly entrusted to others in the course of business and for other reasons, and that Congress could not have intended to provide for the forfeiture of an innocent owner's property.⁵⁴ Although the Court noted that the Company's argument was convincing,⁵⁵ it concluded that the government's interest in upholding its laws outweighed the innocent owner's interest in his property.⁵⁶

The Court imposed a duty upon the property owner to prevent illegal uses of his property, stating: "Congress interposes the care and responsibility of [the owner] in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong."⁵⁷ Stating that its own approach was not novel, the Court compared its approach to that of the concept of deodands.⁵⁸ The Court also cited Blackstone for the premise that the owner's negligence in entrusting his property may be a basis for its subsequent forfeiture.⁵⁹ The Court stated that although the forfeiture provisions may be harsh or unfair, they are "too firmly fixed in the punitive and

person "be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. See also *United States v. One (1) 1972 Wood, 19 Foot Custom Boat*, 501 F.2d 1327 (5th Cir. 1974).

⁵³ 254 U.S. at 510.

⁵⁴ *Id.*

⁵⁵ *Id.* In considering the argument as plausible, the Court stated: "If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the section with the accepted tasks of human conduct." *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* Explaining the rationale of giving the property the "power of complicity and guilt in the wrong" the Court stated:

It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental. If we should regard simply the adaptability of a particular form of property to an illegal purpose, we should have to ascribe facility to an automobile as an aid to the violation of the law. It is a "thing" that can be used in the removal of "goods and commodities" and the law is explicit in its condemnation of such things.

Id. at 513.

⁵⁸ *Id.* See *supra* note 11 and accompanying text for a discussion of the concept of deodands.

⁵⁹ 254 U.S. at 510-11. See *supra* text accompanying note 10 for Blackstone's premise.

remedial jurisprudence of the country to be now displaced."⁶⁰

The Supreme Court in *Van Oster v. Kansas*⁶¹ further supported the notion that the history of forfeiture and governmental interest may displace the innocent owner's interest. In *Van Oster*, an automobile purchaser, pursuant to a sales agreement, allowed the seller to use the automobile for business purposes.⁶² An associate of the seller used the automobile to transport liquor illegally and the car was subsequently forfeited.⁶³ Although the automobile owner argued that the seller illegally used the car without the owner's knowledge or authority, the trial court ordered forfeiture of the automobile, and the Kansas Supreme Court affirmed that order.⁶⁴

The automobile owner asserted that such forfeiture would violate due process of law because of her lack of knowledge and involvement.⁶⁵ The United States Supreme Court, however, found the owner's lack of knowledge or involvement irrelevant to the decision.⁶⁶ The Court explained that a state not only has authority to forfeit property used illegally by the owner, but that it also has authority to forfeit property so used by one in possession of such property.⁶⁷ The Court noted that its decision not only complied with the history of forfeiture,⁶⁸ but that it was also justified by Congress' inten-

⁶⁰ 254 U.S. at 511 (citing *Dobbin's Distillery v. United States*, 96 U.S. 395). See *supra* text accompanying notes 36-45. The *Goldsmith-Grant* Court also relied on *The Palmyra* as advancing the prevailing view of imposing forfeitures on innocent owners. See *supra* notes 20-22 and accompanying text.

⁶¹ 272 U.S. 465 (1926).

⁶² *Id.* at 465-66.

⁶³ *Id.* at 466. The Kansas statute provided that any vehicle used to transport liquor illegally could be forfeited. *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* See *supra* text accompanying note 53 for similar argument.

⁶⁶ 272 U.S. at 467.

⁶⁷ *Id.* See also *United States v. One Ford Coupe*, 272 U.S. 321 (1926) (decided the same day). In *One Ford Coupe* an automobile was used in the illegal transportation of liquor. The owner of the automobile claimed to have no knowledge of the illegal use. The Court, however, reasoned that the owner's innocence was no defense to the forfeiture, stating: "[I]f a forfeiture may be had [by the statute] for such use of a vehicle to evade a tax on illicitly distilled liquor, the interests of innocent persons in the vehicle are not saved." 272 U.S. at 325.

⁶⁸ 272 U.S. at 467. In upholding the decision the Court stated: "It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it." *Id.*

tion that forfeiture be used as a secondary measure to prevent such illegal uses.⁶⁹ The Court, therefore, concluded that an owner relinquishing possession of his property is subject to the peril of possible forfeiture.⁷⁰ The Court easily rejected the owner's due process argument⁷¹ by relying on previous decisions.⁷²

The above-mentioned Supreme Court decisions established a harsh doctrine of forfeiture with regard to the innocent owner or security interest holder. Although such forfeiture seemed deeply entrenched in American jurisprudence the Court, in 1929, began to retreat from this firm position. In *United States v. One 1936 Ford V-8 Deluxe Coach*⁷³ the Court considered the sale of an automobile by a dealer to a purchaser who was acting on behalf of his brother.⁷⁴ The dealer assigned the sales contract to a credit agency which, before accepting the contract, made a thorough investigation of the apparent purchaser.⁷⁵ Believing that the purchaser was uninvolved in illegal activities, the credit agency purchased

⁶⁹ *Id.* at 467-68. See also *General Motors Acceptance Corp. v. United States*, 286 U.S. 49 (1932). In that case, General Motors Corporation intervened as owner of an automobile that was used for transporting liquor illegally. Although General Motors Corporation was an innocent party, the Court reasoned that the order of forfeiture should be upheld because "forfeiture of vehicles bearing smuggled goods is one of the time-honored methods adopted by the Government for the repression of the crime of smuggling." 286 U.S. at 56.

⁷⁰ 272 U.S. at 467. The Court reasoned that this idea would also supply an additional measure against illegal uses and relieve the courts from determining if any form of collusion existed between the innocent owner and the person using the property illegally. *Id.* at 467-68.

⁷¹ See *supra* notes 52-53 and accompanying text for a discussion of the due process argument.

⁷² 272 U.S. at 468 (citing *Goldsmith-Grant Co. v. United States*, 254 U.S. 505; *Dobbin's Distillery v. United States*, 96 U.S. 395). See *supra* notes 36-60 and accompanying text for a discussion of these cases.

⁷³ 307 U.S. 219 (1939).

⁷⁴ *Id.* at 222. The automobile was sold to Guy Walker, the person who used the vehicle illegally. The contract under which the car was sold, however, was executed in the name of Paul Walker, brother of Guy Walker, apparently so Guy Walker's wife would be unable to interfere with the contract. Guy Walker had a record of prior illegal activities. *Id.*

⁷⁵ *Id.* at 223. The credit company investigated Paul Walker before accepting the contract by seeking references from local police authorities. No investigation was made of Guy Walker. *Id.*

the contract.⁷⁶ The brother and true purchaser did, in fact, use the automobile in violation of revenue laws, and the car was subsequently forfeited.⁷⁷

The United States Supreme Court, in an action for remission of the forfeiture,⁷⁸ retreated somewhat from its former position and upheld the remission of forfeiture of the automobile ordered by the Court of Appeals for the Fourth Circuit.⁷⁹ The Court stated that facts and surrounding circumstances must be examined on a case-by-case basis to determine if forfeiture is necessary.⁸⁰ Furthermore, the Court stated that an

⁷⁶ *Id.* at 224.

⁷⁷ *Id.* at 221.

⁷⁸ The petition for remission is an alternative measure an innocent owner may use to prevent forfeiture of his property. See *infra* text accompanying notes 212-219 for a discussion of the petition for remission.

⁷⁹ See *supra* text accompanying notes 20-72 for a discussion of the position of the Supreme Court prior to *One Deluxe Coach*. See also Liquor Law Repeal and Enforcement Act of August 27, 1935, 49 Stat. 872, 878, *relied on in One Deluxe Coach*, 307 U.S. at 221. The Act provides:

Sec. 204(a) Whenever, in any proceeding in court for the forfeiture, under the internal revenue laws, of any vehicle or aircraft seized for a violation of the internal revenue laws relating to liquors, such forfeiture is decreed, the court shall have exclusive jurisdiction to remit or mitigate the forfeiture.

(b) In any such proceeding the court shall not allow the claim of any claimant for remission or mitigation unless and until he proves (1) that he has an interest in such vehicle or aircraft, as owner or otherwise, which he acquired in good faith, (2) that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws of the United States or of any State relating to liquor, and (3) if it appears that the interest asserted by the claimant arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, which ever occurred later, the claimant, his officer or agent, was informed in answer to his inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which the claimant has made any other inquiry as to the character or financial standing of such other person, that such other person had no such record or reputation.

Id.

⁸⁰ 307 U.S. at 225. In interpreting the statute allowing forfeiture, the Court stated: [I]n our view Congress did not intend to impose upon the lienor the obligation to ascertain at his peril the identity of every person having an

innocent owner or security interest holder should be afforded relief where justified.⁸¹ The Court reasoned that a truly innocent party should not have his property forfeited unless such forfeiture is within the "letter and spirit of the law."⁸² In justifying remission of the forfeiture, the Court noted that forfeiture is not a favored remedy;⁸³ it was originally intended to protect revenues, not to punish without fault.⁸⁴ Accordingly, the order of the Circuit Court remitting the forfeiture was affirmed.⁸⁵

Supreme Court activity relating to an innocent owner's or security interest holder's forfeiture of property remained unchanged until 1971. In *United States v. United States Coin & Currency*,⁸⁶ however, the Court rejected a forfeiture. That case involved the conviction of a defendant for failure to register as a gambler and to pay the required gambling tax.⁸⁷ A forfeiture proceeding was instituted against the \$8,674 which was in the defendant's possession at the time of his arrest.⁸⁸

interest in the property and to make inquiry of the law enforcement officers as to the previous record and reputation of every such person, unless from the documents themselves or other surrounding circumstances the lienor possesses information which would lead a reasonably prudent and law-abiding person to make a further investigation.

Id.

The Court apparently reasoned that the loan company was under no duty to make further investigation since the documents it had showed the name of the person it investigated. Compare *One Deluxe Coach* (surrounding circumstances must be examined to determine if forfeiture is necessary and relief should be given where justified) with *Van Oster*, 272 U.S. 465, 467 (owner of property gives possession to another at the peril of forfeiture). See *supra* note 70 and accompanying text.

⁸¹ 307 U.S. at 226. The Court reasoned that in the proper case, the innocent owner should be allowed relief from forfeiture. *Id.*

⁸² *Id.*

⁸³ Many courts state that forfeiture is not a favored remedy but nonetheless order forfeiture by the innocent owner. See, e.g., *United States v. Smith*, 497 F. Supp. 459, *rev'd*, 659 F.2d 97 (N.D. Iowa 1980); *United States v. Modicut*, 483 F. Supp. 70 (M.D. La. 1979); *United States v. One Assortment of 25 Firearms*, 483 F. Supp. 16 (E.D. Tenn. 1979); *Hughes Tool Co. v. Meier*, 489 F. Supp. 354 (D. Utah 1977); *Kane v. McDaniel*, 407 F. Supp. 1239 (W.D. Ky. 1975).

⁸⁴ 307 U.S. at 236. The development of the law of forfeiture as applied to innocent owners, however, was based on the premise that fault of the owner is irrelevant. This view continues to be applied. See *infra* note 101 and accompanying text.

⁸⁵ 307 U.S. at 238.

⁸⁶ 401 U.S. 715 (1971).

⁸⁷ *Id.* at 716.

⁸⁸ *Id.*

The trial court ordered forfeiture of the money and the Court of Appeals for the Seventh Circuit affirmed the order.⁸⁹ The United States Supreme Court set aside the criminal conviction and forfeiture, ordering the money returned.⁹⁰

The government argued that the defendant's criminal intent was irrelevant to the forfeiture action.⁹¹ The Court found this argument unconvincing, although noting that history and prior decisions supported it.⁹² The Court explained that forfeiture statutes could not be used alone but must be considered in conjunction with other forfeiture-related statutes, particularly the mitigation statutes.⁹³ The Court stated that forfeiture statutes, when viewed in that light, "[obviously] are intended to impose a penalty *only* upon those who are *significantly involved in a criminal enterprise*."⁹⁴ Thus, in *United States Coin*, the Court declared that innocent owners were free of possible forfeiture of their property used illegally while in another's possession.⁹⁵

United States Coin's requirement of "significant involvement" in the illegal activity would therefore seem to protect the airplane owner who innocently loaned his plane to another. Also, the person with a security interest in such aircraft could hardly be found to be a participant in any criminal activity solely by virtue of holding a security interest. The statutes would nevertheless continue to provide for forfeiture of an aircraft when the owner's criminal activity warranted such forfeiture.

The most recent Supreme Court case addressing the issue of forfeiture as applied to an innocent owner or security interest holder is *Calero-Toledo v. Pearson Yacht Leasing Company*.⁹⁶ *Calero-Toledo* involved the lease of a yacht by its owner to a

⁸⁹ *Id.*

⁹⁰ *Id.* at 717.

⁹¹ *Id.* at 718-19.

⁹² *Id.* at 719 (citing *Goldsmith-Grant*, 254 U.S. 505; *One Deluxe Coach*, 307 U.S. 219). See *supra* notes 46-60 and 73-85 and accompanying text.

⁹³ 401 U.S. at 721. The statutory provision for mitigation relied on by the Court is 19 U.S.C. § 1618 (1970), discussed *infra* text accompanying notes 212-219.

⁹⁴ 401 U.S. at 721-22 (emphasis added).

⁹⁵ *Id.* at 724.

⁹⁶ 416 U.S. 663 (1974).

lessee who violated the law by bringing illegal drugs on board the yacht.⁹⁷ As a result of the lessee's illegal activity, the yacht was forfeited pursuant to a Puerto Rican statute.⁹⁸ The yacht owner's sole connection with the illegal activity was his lease of the yacht to those who violated the law.⁹⁹ The owner, therefore, was neither involved in nor knowledgeable of the lessee's illegal activities.¹⁰⁰

The Court in *Calero-Toledo* traced the early history of the forfeiture action as applied to innocent property owners and noted that innocence was not a defense to such action.¹⁰¹ Relying on its earlier decisions, the Court reiterated the princi-

⁹⁷ *Id.* at 665.

⁹⁸ *Id.* at 665-66. See P.R. LAWS ANN., tit. 24 § 2512(a) (Supp. 1973) which provides:
§ 2512 Forfeitures

(a) The Following shall be subject to forfeiture to the Commonwealth of Puerto Rico:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this chapter;

(2) All raw materials, products, or equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting of any controlled substance in violation of this chapter;

(3) All property which is used, or intended for use, as a container for property described in clauses (1) and (2) of this subsection;

(4) All conveyances including aircraft, vehicles, mount or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in clauses (1) and (2) of this subsection.

Id. The strictness by which the Court applied the forfeiture statute in this case is revealed in the fact that only one marijuana cigarette was found on board the yacht. 416 U.S. at 693 (Douglas, J. dissenting). See also *United States v. One 1976 Porsche 911S*, 670 F.2d 810 (9th Cir. 1979) (.226 grams of marijuana in vehicle); *United States v. One 1971 Cheverolet Corvette*, 393 F. Supp. 344 (E.D. Pa. 1975) (holding that no matter how small the amount of contraband, vehicle is subject to forfeiture).

⁹⁹ 416 U.S. at 668.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 680-83. Mere innocence of the owner continues to be denied as a defense. See, e.g., *United States v. One 1975 Pontiac Lemans*, 621 F.2d 444 (1st Cir. 1980) (claimant's lack of knowledge or involvement in the illegal activity does not preclude forfeiture of automobile because it is the property which is "guilty and hence deserving of confiscation"); *United States v. One 1975 Ford Pickup Truck*, 558 F.2d 755 (5th Cir. 1977) (holding that forfeiture is proper unless claimant can prove that possession of the property was taken without the owner's consent); *United States v. One 1972 Toyota Mark II*, 505 F.2d 1162 (8th Cir. 1974) (holding that innocence is no defense to a forfeiture action); *Devito v. United States Dept. of Justice, Drug Enforcement Admin.*, 520 F. Supp. 127 (E.D. Pa. 1981) (finding that in addition to proving innocence, the owner must prove she did all reasonably possible to prevent an illegal use); *United*

ple that the thing is guilty, not its owner.¹⁰² It also emphasized that forfeitures ordered against innocent owners furthers the laws against criminal activity¹⁰³ and deters criminal conduct by discouraging such activity.¹⁰⁴ The Court distinguished *United States Coin*,¹⁰⁵ stating: "[that case] did not overrule prior decisions that sustained application to innocents of forfeiture statutes . . . not limited in application to persons 'significantly involved in a criminal enterprise.'"¹⁰⁶ The Court, however, stopped short of declaring forfeiture appropriate in every case. In fact, the Court specifically set forth two situations in which forfeiture by the innocent owner or security interest holder would be inappropriate:

It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate pur-

States v. One 1973 Pace Arrow M300 Motor Home, 379 F. Supp. 223 (C.D. Ca. 1974) (finding that innocence of the owner is not a defense to a forfeiture proceeding).

¹⁰² 416 U.S. at 683. The Court cited: *The Palmyra*, 25 U.S. 1 (12 Wheat) (1827) (proceeding against the property is independent of any personal criminal prosecution against the offender); *United States v. Brig Malek Adhel*, 43 U.S. 210 (2 How.) (1844) (treating the property as the offender regardless of the conduct of the owner); *Dobbin's Distillery v. United States*, 96 U.S. 395 (1878) (subjecting property to forfeiture because of its contribution to the illegal acts); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921) (holding that property has "power of complicity and guilt in the wrong"); *United States v. One Ford Coupe Automobile*, 272 U.S. 321 (1926) (holding that where forfeiture of the property is proper, the innocent owner has no interest); *Van Oster v. Kansas*, 272 U.S. 465 (1926) (holding that the owner's lack of knowledge or involvement is irrelevant to a forfeiture of illegally used property); *General Motors Acceptance Corp. v. United States*, 286 U.S. 49 (1932) (holding that forfeiture of property is a "time-honored" method to prevent illegal activity).

¹⁰³ See *supra* text accompanying note 56.

¹⁰⁴ 416 U.S. at 683-87. See *supra* note 57.

¹⁰⁵ 401 U.S. 721. See *supra* text accompanying notes 93-94 for the rationale used by the Court in *United States Coin*.

¹⁰⁶ 416 U.S. at 688.

poses and was not unduly oppressive.¹⁰⁷

Because the innocent owner in *Calero-Toledo* relinquished possession of the yacht voluntarily and made no attempt to comply with the Court's second exception, the property was ordered forfeited.¹⁰⁸

II. POST *CALERO-TOLEDO*

The cases following *Calero-Toledo* have resulted in divergent views on forfeiture of the property of innocent owners and security interest holders.¹⁰⁹ The courts generally have had no problem with the first exception enunciated in *Calero-Toledo*,¹¹⁰ which involved the taking of property without the owner's consent. The courts in such situations hold that the property should be returned to the owner.¹¹¹ Controversy has arisen, however, with regard to the second exception of *Calero-Toledo*. That exception involves the situation in which the owner lacks knowledge of the illegal activities and does all reasonably possible to prevent such activities.¹¹² The following examination of the post *Calero-Toledo* cases reveals how the courts have interpreted the *Calero-Toledo* exceptions.

A. Cases Allowing Forfeiture

United States v. One 1971 Cheverolet Corvette,¹¹³ decided by the United States District Court for the Eastern District of Pennsylvania, involved the purchase of an automobile by a married woman.¹¹⁴ Although the automobile was purchased with the purchaser's own earnings and was considered to be her property alone,¹¹⁵ title to that automobile was placed both in

¹⁰⁷ *Id.* at 689-90.

¹⁰⁸ *Id.*

¹⁰⁹ See *infra* 113-178 for the interpretations given by the lower federal courts of the *Calero-Toledo* exception.

¹¹⁰ See *supra* text accompanying note 107.

¹¹¹ See, e.g., *United States v. One 1975 Ford Pickup Truck*, 558 F.2d 755 (5th Cir. 1977).

¹¹² See *supra* text accompanying note 107 for the Court's enunciation of the second *Calero-Toledo* exception.

¹¹³ 393 F. Supp. 344 (E.D. Pa. 1975).

¹¹⁴ *Id.* at 345.

¹¹⁵ *Id.* The relevance of the car being considered the wife's alone is that the innocent

her and her husband's names.¹¹⁶ The husband had a history of criminal activity and was warned several times by his wife not to use her automobile in any illegal manner.¹¹⁷ The purchaser, however, permitted the husband to use the automobile often, and he had his own set of keys.¹¹⁸ The husband eventually used the automobile while passing counterfeit bills, and it was subsequently forfeited.¹¹⁹

The purchaser claimed to have no knowledge of the fact that her husband used or intended to use the automobile for an illegal activity.¹²⁰ Therefore, based on the *Calero-Toledo* exceptions to forfeiture, she argued that her automobile should not be forfeited.¹²¹ The district court disagreed, stating: "It is clear that Mrs. Fisher did not take all steps that could reasonably be expected to prevent her husband from using the vehicle for illicit purposes."¹²² The court noted that since the husband had a criminal history, yet was allowed to use the automobile, the owner had not done all reasonably possible to prevent the illegal use, so that the automobile should be forfeited.¹²³ The court additionally noted that placing title of the automobile in both spouse's names arguably was enough to show that the husband had access to the automobile.¹²⁴ Therefore, although the *Calero-Toledo* exceptions were considered by the court, it apparently gave a strict reading to the second *Calero-Toledo* exception and relied more heavily on the established history of allowing forfeiture regardless of the

owner defense could not be raised if the husband was considered as an owner. See *supra* note 2 and text accompanying note 107 for the definition of an "innocent owner."

¹¹⁶ 393 F. Supp. at 345.

¹¹⁷ *Id.* This claim constituted a part of the wife's argument that she had done all she could reasonably do to prevent her property from being put to an illegal use. *Id.* at 348.

¹¹⁸ *Id.* at 345.

¹¹⁹ *Id.* at 344.

¹²⁰ *Id.* See also *United States v. One 1977 Cherokee Jeep*, 639 F.2d 212 (5th Cir. 1981) (ordering vehicle forfeited when husband used it illegally although wife professed no knowledge or involvement in the illegal activity).

¹²¹ 393 F. Supp. at 348.

¹²² *Id.* See also, *United States v. One 1975 Pontiac Lemans Vehicle*, 621 F.2d 444, 448 (1st Cir. 1980) (claimant failed to show all steps were taken to prevent an illegal use of her property).

¹²³ 393 F. Supp. at 348.

¹²⁴ *Id.*

owner's wrongdoing.¹²⁵

The United States District Court for the District of Hawaii used similar reasoning in *United States v. Four (4) Pinball Machines*.¹²⁶ That case involved the lease of pinball machines subject to a special tax.¹²⁷ The pinball machines were seized because of the lessee's failure to pay the tax.¹²⁸ The owner of the machines argued that it was an innocent owner and not "significantly involved in the criminal activity."¹²⁹ Nevertheless, the district court ordered forfeiture of the machines stating: "The courts are not unsympathetic to the truly 'innocent' owner."¹³⁰ The court held that although the owner of the property, was "uninvolved and unaware of" any illegal use of the property, it failed to show that it had done all reasonably possible to prevent such use of its property.¹³¹

In *United States v. One 1973 Buick Riviera Automobile*,¹³² the United States Court of Appeals for the Eighth Circuit faced a situation in which an automobile owner's son used the automobile to transport marijuana.¹³³ As a result of the son's illegal activity, the automobile was forfeited.¹³⁴ The owner's defense to the forfeiture action was his lack of knowledge of any illegal use of his automobile.¹³⁵ The district court gave little weight to the owner's asserted defense, however, and

¹²⁵ The forfeiture of the vehicle, in spite of the owner's lack of knowledge and non-participation in the criminal activity, coupled with a warning not to use the property illegally, seems to indicate that the forfeiture was based on the theory that innocence is irrelevant. See *supra* note 101 for similar holdings.

¹²⁶ 429 F. Supp. 1002 (D. Hawaii 1977).

¹²⁷ *Id.* at 1004.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1006.

¹³⁰ *Id.* at 1006-07.

¹³¹ *Id.* at 1009. The case seems somewhat harsh in that the machines were forfeited for failure of the lessee of the machines to pay a required tax while the owner of the machines was at all times willing to pay the applicable tax to prevent forfeiture. *Id.* at 1004.

¹³² 569 F.2d 897 (8th Cir. 1977).

¹³³ *Id.* at 898. The amount of marijuana found in the vehicle was 234 pounds. *Id.* Compare *Calero-Toledo*, 401 U.S. at 665-66, in which forfeiture was ordered where only one marijuana cigarette was found. See *supra* note 98 and accompanying text.

¹³⁴ 560 F.2d at 898.

¹³⁵ *Id.* at 899.

granted the government's motion for summary judgment.¹³⁶

On appeal to the Eight Circuit, the owner reasserted his innocence, and the government argued that the owner's innocence was irrelevant to the action.¹³⁷ The court agreed with the government, stating that an owner's innocence is not a defense to the forfeiture of his illegally-used property.¹³⁸ The court reasoned that it was unnecessary to consider the *Calero-Toledo* exception of whether the owner had done all he could reasonably do to prevent illegal uses of his property.¹³⁹ Furthermore, the court concluded that even if this exception was considered, the defense would fail because the owner had notice of the possibility of his son's illegal activities, yet permitted him unrestricted use of the automobile.¹⁴⁰ The owner thus could not meet the second *Calero-Toledo* exception, as he failed to do everything reasonably possible to prevent illegal use of his property.¹⁴¹

United States v. Six Thousand Seven Hundred Dollars (\$6,700.00) in United States Currency,¹⁴² involved money embezzled from an estate in Puerto Rico and illegally brought into the continental United States.¹⁴³ Representatives of the Puerto Rican estate argued that the estate clearly was an innocent party, so that the money therefrom should not be for-

¹³⁶ *Id.*

¹³⁷ *Id.* at 900.

¹³⁸ *Id.* (citing *General Motors Acceptance Corp. v. United States*, 286 U.S. 49 (1932) (holding that forfeiture of property is a "time-honored" method for prevention of further criminal activity); *The Palmyra*, 25 U.S. 1 (1927) (proceeding against the property is independent of any personal criminal prosecution against the offenders); *Goldsmith-Grant Co. v. United States*, 96 U.S. 395 (1878) (holding that property has "a power of guilt and complicity in the wrong"); *United States v. Brig Malek Adhel*, 43 U.S. 210 (2 How.) (1844) (treating the property as the offender regardless of the conduct of the owner)).

¹³⁹ 560 F.2d at 901. See *supra* text accompanying note 107. In reference to the *Calero-Toledo* exceptions, the court stated: "[w]e need not decide whether Pearson Yacht provides a potential defense to forfeiture proceedings based on the owner's innocence, however, because even if such defense were available, it could not be supported here." *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² 615 F.2d 1 (1st Cir. 1980).

¹⁴³ *Id.* at 1-2.

feited.¹⁴⁴ The court, affirming the district court's order of forfeiture, however, found that the estate was not an innocent party, as it did not take all reasonably possible steps to avoid the illegal use of its property.¹⁴⁵ The court found that the estate tainted its innocence by mistakenly authorizing individual withdrawals by its co-administrators.¹⁴⁶ The court found that this mistake took the case out of the *Calero-Toledo* exceptions, stating: "To be sure, there may be a subclass of innocent persons to whom forfeiture provisions constitutionally cannot be applied, but the estate's answer failed to allege sufficient facts to bring the estate within that subclass."¹⁴⁷

The United States Court of Appeals for the Sixth Circuit, in *United States v. One 1951 Douglas DC-6 Aircraft*,¹⁴⁸ considered a case involving the interest of the security interest holder in an aircraft where forfeiture was ordered by the district court. As part of the security agreement between the security interest holder and the owner, a clause prohibiting any illegal use of the aircraft was inserted in the agreement.¹⁴⁹ The owner nevertheless used the aircraft for such activities without the security interest holder's knowledge.¹⁵⁰ Although the security interest holder claimed to be innocent of any illegality, the court held that the security interest holder "failed to prove that he exercised due diligence in preventing the use of his collateral" in an illegal activity.¹⁵¹ In so deciding, the court relied on the trial court's finding that the holder failed to "take effective and affirmative steps to see that a properly licensed pilot operate it; that it was not involved in illegal nar-

¹⁴⁴ *Id.* at 2.

¹⁴⁵ *Id.* at 3.

¹⁴⁶ *Id.* The estate deposited its liquid assets in an account but through error did not require the signatures of both administrators to make withdrawals. One of the co-administrators wrote a check on the account without the signature of the other administrator and went to South America with the money. The court determined that the money brought into the United States had to be from the estate account since there was apparently no other way the absconding administrator could otherwise obtain that amount of money. *Id.* at 2.

¹⁴⁷ *Id.* at 3.

¹⁴⁸ 667 F.2d 502 (6th Cir. 1981).

¹⁴⁹ *United States v. One Douglas DC-6 Aircraft*, 525 F. Supp. 13 (W.D. Tenn. 1979).

¹⁵⁰ *Id.* at 15.

¹⁵¹ 667 F.2d at 503.

cotic traffic; and that it was properly registered with United States authorities, including his security claim as collateral."¹⁵²

The United States Court of Appeals for the Tenth Circuit rejected a similar defense in *United States v. One 1957 Rockwell Aero Commander 680 Aircraft*.¹⁵³ The innocent owner in that case received the airplane in payment of a debt.¹⁵⁴ The aircraft was flown in violation of customs laws and was subsequently seized and ordered forfeited by the district court.¹⁵⁵ The seizure, however, took place six months after the owner had acquired title, and the owner was totally unaware of any use of his aircraft during that time.¹⁵⁶

The owner's defense was that he was without knowledge of the illegal use of the aircraft,¹⁵⁷ but, the Tenth Circuit held this defense was insufficient.¹⁵⁸ The court stated that "the owner's apparent complete inattentiveness to the aircraft for a period in excess of six months may certainly be deemed negligence in light of the *Calero-Toledo* standard."¹⁵⁹ In reaching its decision, the court noted that the forfeiture was harsh but reasoned that the governmental interest in preventing crimes outweighed this harshness.¹⁶⁰

B. *Cases in Which Forfeiture Was Not Ordered*

The decisions of the lower Federal courts discussed above seem somewhat harsh when applied to the interest of the innocent owner or security interest holder. On similar fact situations, other courts have reached the opposite and seemingly fairer result. In *United States v. One 1974 Cougar XR-7*,¹⁶¹ a vehicle was seized while in the possession of the owner's live-in

¹⁵² 525 F. Supp. at 16.

¹⁵³ 671 F.2d 414 (10th Cir. 1982).

¹⁵⁴ *Id.* at 415-16.

¹⁵⁵ *Id.* When coming back into the United States from Mexico, the plane failed to give the required advance notice and did not land at a customs airport. *Id.*

¹⁵⁶ *Id.* at 415-16.

¹⁵⁷ *Id.* at 416.

¹⁵⁸ *Id.* at 418.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 417. See *supra* note 60 and accompanying text for similar reasoning.

¹⁶¹ 397 F. Supp. 1325 (C.D. Cal. 1975).

boyfriend¹⁶² who used it to transport heroin.¹⁶³ The California district court stated that although the owner was well acquainted with the person using the vehicle illegally, there was no evidence that the owner had any knowledge of this particular illegal activity.¹⁶⁴ The court reasoned that the exceptions of *Calero-Toledo* applied and thereby prevented forfeiture, holding that the innocent owner had done all that she could reasonably do to prevent the illegal use of her property.¹⁶⁵

In *United States v. One 1972 Chevrolet Blazer Vehicle*,¹⁶⁶ a forfeiture was ordered by the trial court in a situation involving the illegal use of the vehicle by the owner's father.¹⁶⁷ Although the father drove the vehicle with his son's permission, the son asserted that he neither consented to the illegal use of the vehicle nor had knowledge of such use.¹⁶⁸ The trial court granted the government's motion for summary judgment and ordered forfeiture, noting that, although forfeiture is a harsh rule, an owner is required "to know more about his buyer, to know more about his lessee, to know more about the person to whom he loaned the car"¹⁶⁹ The Ninth Circuit reversed the order granting summary judgment, however, and held that the owner should have the opportunity to present the defense on remand.¹⁷⁰

Forfeiture was denied by the United States District Court for the Western District of Pennsylvania in *United States v. One*

¹⁶² *Id.* at 1326.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1328.

¹⁶⁵ *Id.* The circumstances to which the court refers are basically similar to cases where forfeiture was ordered. See, e.g., *supra* text accompanying notes 114-124. The court in *One 1974 Cougar* appears to be applying a more favorable reading of the *Calero-Toledo* standards to the innocent owner.

¹⁶⁶ 563 F.2d 1386 (9th Cir. 1977).

¹⁶⁷ *Id.* at 1387.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1388.

¹⁷⁰ *Id.* at 1391. For similar holdings, see *United States v. One Tintoretto Painting Entitled "The Holy Family With Saint Catherine and Honored Donor,"* 691 F.2d 603 (2d Cir. 1982); *Devito v. United States Dept. of Justice, Drug Enforcement Admin.*, 520 F. Supp. 127 (E.D. Pa. 1981).

1976 *Lincoln Mark IV*.¹⁷¹ In that case, an owner loaned his automobile to his brother-in-law who subsequently used it to transport heroin from Detroit to Pittsburgh.¹⁷² There was no evidence that the owner was involved in any of the illegal activities or that he had any knowledge of any possible illegal use of his automobile.¹⁷³ Although the court stated that innocence provided no defense to a forfeiture proceeding,¹⁷⁴ it did note that the *Calero-Toledo* exception would prevent forfeiture if the owner had done all reasonably possible to prevent the illegal use of his property.¹⁷⁵

The court explained that this exception was not easily met, as it called for an affirmative duty to protect the property from illegal uses.¹⁷⁶ In attempting to delineate the nature of this affirmative duty, the court stated that "what one 'reasonably could be expected [to do]' to prevent criminal use of property is a standard that must be tailored to individual circumstances."¹⁷⁷ Under the circumstances of this case, the court reasoned that forfeiture should not be allowed because the owner "did all that could be reasonably expected of him to prevent illegal use of the vehicle" and to order forfeiture of the vehicle "would be only to deprive an innocent party of his car."¹⁷⁸

III. OTHER DEFENSES TO THE FORFEITURE ACTION

Even if an innocent owner or security interest holder cannot prove that he did everything reasonably possible to prevent illegal use of his property, other defenses exist which may entitle him to keep his property. These defenses may be used in addition to the *Calero-Toledo* exception explained above. These defenses will be discussed under headings as

¹⁷¹ 462 F. Supp. 1383 (W.D. Pa. 1979).

¹⁷² *Id.* at 1386.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1387. See *supra* note 101 for similar holdings.

¹⁷⁵ 462 F. Supp. at 1387.

¹⁷⁶ *Id.* at 1391. Contrasting this duty with the innocence of an owner the court stated that "[i]t connotes an affirmative duty, whereas innocence of crime and ignorance of potential wrongdoing are passive conditions." *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

follows: lack of probable cause, illegal search and seizure, the scope of the forfeiture statutes, prompt adjudication and the petition for remission or mitigation.

A. *Lack of Probable Cause*

The showing of probable cause is often essential to the government's action for forfeiture, as most statutes make such a showing a prerequisite to forfeiture.¹⁷⁹ Thus, if the innocent owner or security interest holder can prove a lack of probable cause, he may be able to destroy the government's case. Once the government establishes a showing of probable cause, however, the burden of proof shifts to the owner or security interest holder to show, by a preponderance of the evidence, that the property is not subject to forfeiture.¹⁸⁰

Generally, courts evaluate probable cause in a forfeiture action under the same standard as that in other search and seizure cases.¹⁸¹ By this standard, the cause must be "reasonable under the circumstances."¹⁸² Probable cause may also be defined as a "reasonable ground for belief that the property is being used illegally requiring less than prima facie proof but more than a mere suspicion."¹⁸³ Once the government establishes probable cause, it may seize property with-

¹⁷⁹ Smith, *supra* note 7, at 667.

¹⁸⁰ *Id.* See *United States v. Fourteen (14) Handguns*, 524 F. Supp. 395 (S.D. Tex. 1981) (finding that once the government shows probable cause, the burden of proof shifts to the claimant); *United States v. One 1977 Chevrolet Pickup*, 503 F. Supp. 1027 (D. Colo. 1980) (finding that the government has the burden of proving probable cause and the claimant has the burden of showing that the forfeiture action is outside the statute); *United States v. Twenty-Six Firearms*, 485 F. Supp. 549 (W.D. Pa. 1980) (finding that where the government has proven probable cause, the burden of proof shifts to the claimants); *United States v. One 1976 Lincoln Mark IV*, 462 F. Supp. 1383 (W.D. Pa. 1979) (finding that once the government shows probable cause, forfeiture is automatic unless claimant can prove the forfeiture is not within the statute); *United States v. One (1) Douglas A-26B Aircraft*, 436 F. Supp. 1292 (S.D. Ga. 1977) (finding that probable cause must first be shown, then the burden shifts to the claimant to show why the property is not subject to forfeiture).

¹⁸¹ Smith, *supra* note 7, at 677. See *United States v. One 1975 Mercedes 280S*, 590 F.2d 196 (6th Cir. 1978); *United States v. One 1973 Pontiac Grand Am*, 413 F. Supp. 162, 165 (W.D. Tex. 1976).

¹⁸² Smith, *supra* note 7, at 677.

¹⁸³ *Id.* See *United States v. One 1979 Mercury Cougar XR-7*, 666 F.2d 228 (5th Cir. 1982); *United States v. One 1975 Mercedes 280S*, 590 F.2d 196 (6th Cir. 1978).

out a warrant.¹⁸⁴ Courts rationalize such warrantless seizure by finding that the property belongs to the government at the moment of its illegal use.¹⁸⁵ Furthermore, since forfeiture is a proceeding in rem,¹⁸⁶ the property has no rights under the fourth amendment.¹⁸⁷

B. *Illegal Search and Seizure*

Analogous to the defense of no probable cause is the defense of illegal search and seizure of relevant evidence.¹⁸⁸ The innocent owner may be unable to assert this defense in all jurisdictions, however,¹⁸⁹ as some courts believe that the reason for protection against unreasonable searches and seizures is an individual's legitimate expectation of privacy.¹⁹⁰ The fourth amendment's protection against unreasonable searches and seizures can only be raised by the person whose rights were violated, not by one who will also be incidentally aggrieved by the illegally obtained evidence.¹⁹¹ Thus, some courts have held that because the forfeited property was in another's possession, the owner has given up his right of privacy.¹⁹²

C. *The Scope of the Forfeiture Statutes*

The innocent owner or security interest holder may be able to prevent forfeiture by showing that the illegal use of the

¹⁸⁴ Comment, *An Analysis of Federal Drug-Related Civil Forfeiture*, 34 ME. L. REV. 435, 450 (1982).

¹⁸⁵ *Id.* The rationale is that at the time of a violation of a forfeiture statute, the property is forfeited. A trial is held only to perfect title in the government. *Id.*

¹⁸⁶ See *supra* note 25 for the definition of a proceeding in rem.

¹⁸⁷ Comment, *supra* note 184, at 450.

¹⁸⁸ See Comment, *supra* note 184, at 449-50. See also Smith, *supra* note 7, at 679-82; Note, *Constitutional Law — Fourth Amendment — Illegal Seizure of Derivative Contraband Bars Forfeiture*, 60 WASH. U.L.Q. 724 (1982).

¹⁸⁹ Smith, *supra* note 7, at 679. See *Dodge v. United States*, 272 U.S. 530 (1926); *United States v. One Ford Coupe Automobile*, 272 U.S. 321 (1926).

¹⁹⁰ See *Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Portillo*, 633 F.2d 1313 (9th Cir. 1978), *cert. denied*, 450 U.S. 1043 (1981).

¹⁹¹ *Alderman v. United States*, 394 U.S. 165, 171-72 (1969); *United States v. One 1977 Mercedes Benz*, 450SEL, 708 F.2d 444, 448 (9th Cir. 1983).

¹⁹² See *United States v. Dall*, 608 F.2d 910 (1st Cir. 1979), *cert. denied*, 445 U.S. 918 (1980); *United States v. Dyar*, 574 F.2d 1385 (5th Cir.), *cert. denied* 439 U.S. 982 (1978).

property was not within the scope of the forfeiture statute.¹⁹³ The defense hinges on the statute's construction as applied to the role of the property in the crime.¹⁹⁴ The use of this defense is illustrated by *United States v. One Dodge Coupe*¹⁹⁵ and *Platt v. United States*,¹⁹⁶ which provide the general tests.¹⁹⁷ In *One Dodge Coupe* the vehicle's only connection to the crime was that it transported the offender to the scene of the illegal activity.¹⁹⁸ The vehicle was nevertheless subject to forfeiture.¹⁹⁹ The court reasoned that the vehicle was used to facilitate the illegal activity because it "[brought the owner] part of the distance over which the contraband would otherwise have to travel in order to reach him, it made the task less difficult and lessened the labor thereof."²⁰⁰

The *Platt* test, more favorable from the owner's point of view, requires more than merely making the "task less difficult" or "lessening the labor thereof."²⁰¹ In *Platt* the owner of the vehicle loaned it to her daughter.²⁰² The daughter drove to a drugstore where she purchased morphine with a false prescription.²⁰³ The Tenth Circuit defined "facilitate" as used in the statutes with its "ordinary and accepted meaning."²⁰⁴ Under this definition, the court held that a vehicle was subject to forfeiture if "it is used to assist in the commission of the crime."²⁰⁵ The court concluded that the vehicle was not subject to forfeiture in this case, stating: "The means employed by [the daughter] in going to the store had nothing to do with the purchase. The ease or difficulty of the purchase would have been the same no matter how she got

¹⁹³ See Smith, *supra* note 7, at 683-86.

¹⁹⁴ *Id.*

¹⁹⁵ 43 F. Supp. 60 (S.D.N.Y. 1942).

¹⁹⁶ 173 F.2d 165 (10th Cir. 1947).

¹⁹⁷ Smith, *supra* note 7, at 683-84.

¹⁹⁸ 43 F. Supp. at 60.

¹⁹⁹ *Id.* at 62.

²⁰⁰ *Id.*

²⁰¹ Smith, *supra* note 7, at 684; 163 F.2d at 167.

²⁰² 163 F.2d at 166.

²⁰³ *Id.*

²⁰⁴ *Id.* at 167.

²⁰⁵ *Id.*

there."²⁰⁶ Thus, this test requires that the vehicle have a more active role in the illegal activity.²⁰⁷

D. *Prompt Adjudication*

The government's failure to promptly bring a forfeiture action after seizure of the property may also prevent a forfeiture.²⁰⁸ The basis of this defense is that a claimant has a constitutional right to prompt adjudication of his property interests.²⁰⁹ No general rule exists defining unreasonable time, and courts apply varying standards, depending on the circumstances of each case.²¹⁰ The courts generally look to the consequences of delay in considering whether forfeiture is unreasonable under the circumstances.²¹¹

E. *The Petition for Remission or Mitigation*

If the innocent owner or security interest holder does not wish to risk losing his property in a judicial proceeding, he may file a petition for remission or mitigation of the forfeiture.²¹² If the remission or mitigation approach is chosen, however, no other challenges are allowed thereafter, as filing the petition presumes the validity of the forfeiture.²¹³ The

²⁰⁶ *Id.*

²⁰⁷ *Smith*, *supra* note 7, at 684.

²⁰⁸ *Id.* at 694-706. *See also* Comment, *supra* note 184, at 454. *See generally* Kandaras, *Federal Property Forfeiture Statutes: The Need to Guarantee a Prompt Trial*, 33 U. FLA. L. REV. 195 (1981); Kandaras, *Due Process and Federal Property Forfeiture Statutes: The Need for Immediate Post-Seizure Hearing*, 34 Sw. L.J. 925 (1980).

²⁰⁹ *Smith*, *supra* note 7, at 694 (stating that due process prohibits long delays); Comment, *supra* note 184, at 454 (discussing deprivation of due process).

²¹⁰ *See, e.g.*, *Ivers v. United States*, 581 F.2d 1361 (9th Cir. 1978) (holding that delay attributed to claimant does not jeopardize government's case); *United States v. One 1970 Ford Pickup Truck*, 564 F.2d 864 (9th Cir. 1977) (holding delay of eleven months as unreasonable); *United States v. \$62,972 in United States Currency*, 539 F. Supp. 586 (D. Nev. 1982) (finding that delay must be reasonable); *United States v. One (1) Douglas A-26B Aircraft*, 436 F. Supp. 1292 (S.D. Ga. 1977) (finding that an eight and one-half month delay in instituting forfeiture proceeding dictated return of aircraft).

²¹¹ Comment, *supra* note 184, at 454. *See also* *United States v. \$62,972 in United States Currency*, 539 F. Supp. 386 (D. Nev. 1982) (finding that delay was not warranted even where property was not a wasting asset).

²¹² *Smith*, *supra* note 1, at 17-19. *See also* *Smith*, *supra* note 7, at 671-76.

²¹³ *Smith*, *supra* note 1, at 17-19. *See* 28 C.F.R. § 9.5(b) (1982) which provides: "The Determining Official shall not consider whether the evidence is sufficient to support the forfeiture since the filing of a petition presumes a valid forfeiture."

petition for remission or mitigation is, therefore, a last resort and should be used only in the absence of other defenses.²¹⁴

The petition for remission or mitigation is considered a "matter of executive grace" and is unreviewable by the courts.²¹⁵ The requirements for a remission or mitigation resemble those under the *Calero-Toledo* defense,²¹⁶ as the claimant must prove the forfeiture was not due to any negligence or intent to violate the law on his part.²¹⁷ If a complete remission of the forfeiture is not obtained, some relief may nevertheless be available in the form of a mitigation of the forfeiture.²¹⁸ Such mitigation is applicable where, although

²¹⁴ Smith, *supra* note 1, at 19.

²¹⁵ *Id.* See Smith, *supra* note 7, at 672; see also *United States v. One 1976 Porsche 911S*, 670 F.2d 810 (9th Cir. 1979) (holding that Attorney General may in his discretion return property); *Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978) (holding that remission is a matter of legislative grace not reviewable by the courts); *Devito v. United States Dep't of Justice, Drug Enforcement Admin.*, 520 F. Supp. 127 (E.D. Pa. 1981) (finding that a court cannot review the discretion of the Attorney General who denied a petition for remission); *United States v. One 1976 Lincoln Mark IV*, 462 F. Supp. 1383 (W.D. Pa. 1979) (finding no right to a remission of forfeiture because it is a matter of grace); *Walker v. United States*, 438 F. Supp. 251 (S.D. Ga. 1977) (finding that denial of a petition of remission is not reviewable by the courts).

²¹⁶ See *supra* text accompanying note 107 for the *Calero-Toledo* exceptions to forfeiture.

²¹⁷ Smith, *supra* note 1, at 19. See also 19 U.S.C. § 1618 (1970) which provides:

Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

19 U.S.C. § 1618 (1970).

²¹⁸ See, e.g., 28 C.F.R. § 9.6 (1982). That regulation provides:

Section 9.6 Provisions applicable to particular situations.

(a) Mitigation: In addition to his discretionary authority to grant relief by way of complete remission of forfeiture, the determining official may, in the exercise of his discretion, mitigate forfeitures of seized property. This authority may be exercised in those cases where the petitioner has not met the minimum conditions precedent of remission but where there

the conditions of remission are not met, extreme hardship would result from forfeiture.²¹⁹

IV. SUMMARY

The decisions of the Supreme Court established a harsh doctrine of forfeiture towards the innocent owner. The basis for forfeiture started with *The Palmyra*'s²²⁰ consideration of the thing as the offender, without regard to the owner's wrongdoing.²²¹ *Dobbin's Distillery*²²² adopted *The Palmyra*'s harsh theory and added the additional theory that an owner leases his property subject to the consequences of its illegal use.²²³ Additional justification for forfeiture of an innocent owner's property was enunciated in *Goldsmith-Grant*.²²⁴ In that case, the Court held that governmental interest in enforcing laws outweighed the consequences of forfeiture to the innocent owner or security interest holder.²²⁵ The Supreme Court drew both from the history of forfeiture and previous decisions to uphold forfeiture in the case of *Van Oster*.²²⁶ Although the Supreme Court seemed to retreat from this harsh stance for a brief period,²²⁷ it reaffirmed its harsh position in *Calero-Toledo*.²²⁸ *Calero-Toledo* introduced the test requiring the owner or security interest holder to have taken all reason-

are present other extenuating circumstances indicating that some relief should be granted to avoid extreme hardship. Mitigation may also be granted where the minimum standards for remission have been satisfied but the overall circumstances are such that, in the opinion of the determining official, complete relief is not warranted. Mitigation shall take the form of a money penalty imposed upon the petitioner in addition to any other sums chargeable as a condition to remission. This penalty is considered as an item of cost payable by the petitioner.

Id.

²¹⁹ Smith, *supra* note 7, at 672. See, e.g., 28 C.F.R. § 9.6 (1982).

²²⁰ 25 U.S. 1 (1827).

²²¹ See *supra* note 32 and accompanying text.

²²² See *supra* notes 36-45 and accompanying text.

²²³ See *supra* text accompanying note 44.

²²⁴ See *supra* notes 46-60 and accompanying text.

²²⁵ See *supra* text accompanying note 56.

²²⁶ See *supra* notes 61-72 and accompanying text.

²²⁷ See *supra* notes 73-94 and accompanying text.

²²⁸ See *supra* notes 96-108 and accompanying text.

ably possible steps to prevent the illegal use of his property.²²⁹

The lower federal courts are divided as to whether the innocent owner's or security interest holder's property is subject to forfeiture. The common element seen in the cases is a determination of whether the owner or security interest holder was able to fit within the above-mentioned exception of *Calero-Toledo*.²³⁰ Some actions do exist to protect the innocent owner or security interest holder's interest.²³¹

The key question is whether the owner did all he could reasonably do to prevent the illegal use of his property. The cases are in agreement, however, that innocence is not enough,²³² thereby requiring an affirmative duty to protect the property from an illegal use.²³³ The owner must affirmatively try to prevent his property from being used by one known to have engaged in illegal activities.²³⁴ Where there is no knowledge of past illegal activities, the owner still may need to investigate the person to whom he intends to give possession of the property.²³⁵ Furthermore, the owner must not negligently, or through inattentiveness, fail to protect his property from illegal use.²³⁶

V. CONCLUSION

In owning aircraft, and in dealings involving them, there is

²²⁹ See *supra* text accompanying note 107 for the *Calero-Toledo* standard.

²³⁰ The cases discussed in this comment which were held to be without the *Calero-Toledo* exceptions are: *United States v. One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414 (10th Cir. 1982); *United States v. One 1951 Douglas DC-6 Aircraft*, 667 F.2d 502 (6th Cir. 1981); *United States v. Six Thousand Seven Hundred Dollars (\$6,700.00) in United States Currency*, 615 F.2d 1 (1st Cir. 1980); *United States v. One 1973 Buick Riviera Automobile*, 560 F.2d 897 (8th Cir. 1977); *United States v. Four (4) Pinball Machines*, 429 F. Supp. 1002 (D. Hawaii 1977); *United States v. One 1971 Chevrolet Corvette*, 393 F. Supp. 344 (E.D. Pa. 1975). Cases discussed where forfeiture was not ordered are: *United States v. One 1972 Chevrolet Blazer Vehicle*, 563 F.2d 1386 (9th Cir. 1977); *United States v. One 1976 Lincoln Mark IV*, 462 F. Supp. 1383 (W.D. Pa. 1979); *United States v. One 1974 Cougar XR-7*, 397 F. Supp. 1325 (C.D. Cal. 1975).

²³¹ See *supra* notes 179-219 and accompanying text.

²³² See *supra* note 101 and accompanying text.

²³³ See *supra* note 176 and accompanying text.

²³⁴ See *supra* text accompanying notes 117-119 and 164.

²³⁵ See *supra* text accompanying note 169.

²³⁶ See *supra* text accompanying note 159.

a reasonable chance that the owner or security interest holder will be seeking advice from an attorney. The attorney should advise such clients of the possibility that the aircraft could be forfeited if used illegally even though the innocent owner or security interest holder can claim complete innocence.²³⁷ The client should be told why the property may be forfeited and a forfeiture prevention plan explained to the client.²³⁸ The client should be advised to not place his property in the possession of someone who he knows has a record of past criminal activity and, considering the value of an aircraft, should make an investigation of the potential users of the aircraft.²³⁹ Care should be taken that the property is not neglected for any appreciable time and deals involving the aircraft should be carefully thought out in advance. Other factors should also be considered depending on the circumstances of the particular owner or security agreement. Some type of affirmative action that shows the owner's concern with preventing the illegal use of his property may tend to sway an otherwise hostile court.

²³⁷ Smith, *supra* note 1, at 14.

²³⁸ *Id.*

²³⁹ *Id.*

Casenotes and Statute Notes

